Supreme Court of the United States

OCTOBER TERM, 1938.

No. 449.

NEWARK FIRE INSURANCE COMPANY,
Appellant,

vs.

STATE BOARD OF TAX APPEALS and THE CITY OF NEWARK,
Respondents.

BRIEF OF APPELLANT.

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TABLE OF CONTENTS.

Table of Cases Cited.

STATUTES.

AUTHORITIES.

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I.

The Opinions of the Courts Below.

The Essex County Board of Taxation rendered no formal opinion.

The opinion of the State Board of Tax Appeals is not reported officially, but is contained in the record (R. 4).

The opinion of the Supreme Court of New Jersey is reported in 118 N. J. L. 525 (R. 22).

The *per curiam* opinion of the Court of Errors and Appeals of New Jersey is reported in 120 N. J. L. 224 (R. 7).

II.

Statement of the Case.

This appeal brings up for review the judgment of the Court of Errors and Appeals of New Jersey, entered May 31, 1938, sustaining an *ad valorem* personal property assessment in the amount of $1,069,000.00 and the tax levied thereon by the respondent City of Newark for the year 1935 against appellant's intangible personal property, which had acquired a business situs at appellant's commercial domicile in New York.

Respondent imposed the assessment and levied the tax under the following sections of Chapter 236 of the Laws of 1918 of New Jersey:

> "All property, real and personal, within the jurisdiction of this State, not expressly exempted by this act or excluded from its operation, shall be subject to taxation annually under this act at its true value, and shall be valued by the assessors of the respective taxing districts. Property omitted by the assessors may be assessed as hereinafter provided. All property shall be assessed to the owners thereof with reference to the amount owned on the first day of October in each year, and the persons so assessed for personal property shall be personally liable for the taxes thereon." (*Section 202,* p. 848).
>
> "The tax on all tangible personal property in this State and on all taxable personal property of non-residents of this State shall be assessed in and for the taxing district where such property is found. The tax on other personal property shall be assessed on each inhabitant in the taxing district where he resides on the first day of October in each year. * * *"

(*Section 301*, p. 853, *as amended by Chapter 310 of the Laws of 1920.*)

"Every fire insurance company and every stock insurance company other than life insurance shall be assessed in the taxing district where its office is situate, upon the full amount of its capital stock paid in and accumulated surplus; the real estate belonging to every such corporation, however, shall be taxed in the taxing district where such real estate is situated, and the amount of assessment upon said real estate shall be deducted from the amount of any assessment made upon the capital stock and accumulated surplus, as herein provided for; no franchise tax shall be imposed upon any such fire insurance company or other stock insurance company included in this section." (*Section 307*, p. 858.)

The tax under the act is a personal property tax on the intangible property of appellant. (Opinion of New Jersey Supreme Court R. 23.) Applying the method set forth in *People's Fire Insurance Co.* v. *Parker, Receiver*, 34 N. J. L. 479 (Sup. Ct. 1870), *affirmed* 35 N. J. L. 575 (E. & A. 1871), and *Trenton* v. *Standard Fire Ins. Co.*, 77 N. J. L. 757 (E. & A. 1909), the assessment was computed upon the total intangible assets of appellant after deducting debts and exemptions allowed by law.

These proceedings were initiated by the appellant by filing a petition to set the assessment aside with the Essex County Board of Taxation, which sustained the assessment and the levy of the tax without formal opinion. An appeal was taken from this judgment to the State Board of Tax Appeals, where, after a hearing *de novo*, the assessment and the levy were again sustained. On certiorari, the New Jersey Supreme Court sustained this judgment. On

appeal, the judgment of the Supreme Court was affirmed by the Court of Errors and Appeals of New Jersey.

Before each of the tax boards and each of the appellate courts, appellant urged that the taxing statutes quoted above, as construed and applied, deprived it of its property without due process of law in violation of the 14th Amendment to the Constitution of the United States. Each of the tax boards and each of the appellate courts considered this question and decided it adversely to the appellant. The determination of this question in appellant's favor would have been a holding that there was no jurisdiction to tax and would have been dispositive of the whole case.

The facts involved in this controversy are not in dispute. The appellant is a corporation organized under the laws of the State of New Jersey, and engaged in the fire insurance business, with its business situs or commercial domicile in the State of New York. As required by the laws of New Jersey, it has designated 41 Clinton Street, Newark, as its registered office in the State of New Jersey. Here it maintains, however, only a local or regional claim and underwriting department of the Counties of Essex, Union, Bergen and Hudson in New Jersey. Since 1929 the appellant's main office has been located at 150 William Street, New York City, where all the books of the corporation are kept (except the stock and transfer books which are required by the laws of New Jersey to be kept in New Jersey). Its executive officers are employed at its executive or main office in New York City. It is there also that the appellant maintains its general accounting and underwriting offices, and it is there that the general accounts of the company are kept. It is there also that all of the general affairs of the company are conducted. All the cash and the

securities of the company are kept there or in banks in New York City or other banks outside of New Jersey with the exception of a small sum on deposit in New Jersey (equal to about 1% of the company's cash deposits) (R. 15, 16). The company pays a franchise tax in New York based upon premiums, but pays no personal property tax there (R. 20).

There are no executive offices at the Newark office and all reports on the local business conducted there are sent to New York. The appellant, having assets of $8,178,316.89, has no personal property, tangible or intangible, within the State of New Jersey, with the exception of a bank deposit of $6,425.32 and furniture having a value of $1,500.00 (R. 15, 16).

Three successive tribunals, the State Board of Tax Appeals, the Supreme Court and the Court of Errors and Appeals, found that appellant's commercial domicile and the business situs of its intangible personal property taxed by the City of Newark were located in New York (R. 5, 8, 23, 28). This is demonstrated by the opinion of the Supreme Court, where Mr. Justice Perskie, in disposing of the constitutional question, said (R. 23):

> "This question must, in light of the proofs, be considered upon the inescapable premise that prosecutor had its business *situs* as of October 1st, 1934, and still has it, in New York; that the securities, the personalty involved, have become an integral part of its business *situs* in New York; but that prosecutor pays no personal property tax to the State of New York."

All three tribunals held, however, that the intangible personal property was subject to taxation in the State of

New Jersey by the City of Newark. All three tribunals rested their judgment upon the fiction of *mobilia sequuntur personam* in reliance upon the decisions of this Court in *Cream of Wheat Co.* v. *County of Grand Forks*, 253 U. S. 325 (1920) and *Citizens National Bank of Cincinnati* v. *Durr*, 257 U. S. 99 (1921). The New Jersey Supreme Court and the Court of Errors and Appeals, which adopted the opinion of the Supreme Court in a *per curiam* affirmance, although sustaining the assessment at the same time stated that doubts had been cast upon the applicability of the fiction in recent decisions of this Court. Mr. Justice Perskie, speaking for the New Jersey Supreme Court, expressed these doubts succinctly as follows (R. 25):

> "In so holding the Court was very careful to point out, notwithstanding its holding in the *Cream of Wheat* case, that the question involving the right of the domiciliary state to tax when the 'business situs' exception applied is an open one. Decision thereof has been expressly reserved *cf. Farmers Loan and Trust Co.* v. *Minnesota, supra* (at p. 213), and *First National Bank of Boston* v. *Maine, supra* (at p. 331). While this doubt has been cast by the highest court of our land, that body has never expressly overruled its decision in the *Cream of Wheat* case. Until such time as that case is reconsidered, we are bound by its holding that there is a sufficient interrelation between the state of the domicile and the intangibles which have acquired a business *situs* elsewhere to justify the imposition of a personal property tax by the former upon the latter."

The question presented on this appeal is a substantial one, and cannot be considered solely from the standpoint of the interests of the appellant. It is of great general

importance and affects countless numbers of taxpayers similarly situated. Since this case was docketed, in New Jersey alone the taxing authorities have instituted proceedings to make assessments in the amount of five billions of dollars against corporations which maintain only a registered office within this State. Substantially all of the intangible personal property sought to be assessed is situated outside of the State of New Jersey. The importance of the problem is indicated by the fact that in Jersey City the assessments sought to be imposed in the amount of $4,362,385,100.00 involve taxes on such intangible personal property in the sum of $199,952,821.00, while in Newark such assessments in the amount of $570,000,000.00 involve taxes totaling $23,553,800.00.[1]

III.

Specification of Errors.

The judgment of the Court of Errors and Appeals of New Jersey in affirming the judgment of the New Jersey Supreme Court and in holding that the assessment levied by the City of Newark under Chapter 236 of the Laws of New Jersey of 1918, sections 202, 301 and 307, against the intangible personal property of petitioner for taxes for the year 1935 is a valid assessment, was erroneous and illegal because the commercial domicile of appellant and the business situs of the property taxed was located in New York beyond the jurisdiction of the taxing district. These sec-

[1] New York Times, November 24, 1938, p. 33, col. 2 (Late City Edition); New York Times, November 30, 1938, p. 4, cols. 2 and 3 (Late City Edition); New York Times, December 1, 1938, p. 20, col. 4 (Late City Edition).

tions of the taxing statute as construed and applied by the Court of Errors and Appeals of the State of New Jersey deprive the petitioner of its property without due process of law and are repugnant to the 14th Amendment to the Constitution of the United States.

IV.

ARGUMENT.

POINT I.

Sections 202, 301 and 307 of Chapter 236 of the Laws of New Jersey of 1918, as construed and applied by the Court of Errors and Appeals of the State of New Jersey deprive the appellant of its property without due process of law and are repugnant to the 14th Amendment to the Constitution of the United States.

Appellant contends that where a corporation has acquired a commercial domicile in a state other than the state of incorporation, and its intangible personal property has likewise acquired a business situs there and has become an integral part of its commercial domicile, the intangible personal property is no longer within the taxing jurisdiction of the state of incorporation, but is within the taxing jurisdiction of the state of the situs alone. Taxation of such property by any other state deprives the taxpayer of his property without due process of law in violation of the 14th Amendment to the Constitution of the United States. This is so whether or not the state of the commercial domicile or of the business situs of the intangibles exercises its jurisdiction to tax the intangibles.

A.

The Business Situs of the Intangibles Taxed Is in New York, and New Jersey Therefore Has No Jurisdiction to Tax.

A review of the development and changes in the law of taxation, and more particularly of the laws of jurisdiction to tax, demonstrates that the old fiction *mobilia sequuntur personam,* formerly adequate for all purposes and still adequate where the property has acquired no business situs, no longer meets the complex demands of a highly developed commercial and industrial nation.

In early feudal times, the chief item of wealth was real estate, and it was not strange that such property should have been the chief source of revenue. Personal property was of comparative insignificance as an item of wealth and was therefore relatively unimportant in the field of taxation. Moreover, the taxation of personal property involved serious practical problems which dated back to the Dark Ages. Much of such wealth consisted of gold and jewels which could easily be secreted and which could easily be moved from one jurisdiction into another. Difficulties were frequently encountered in the inability of the taxing authority at the situs to discover the identity of the owner.

The common law of succession to personal property had solved the problem of conflict of jurisdiction by the adoption of a legal fiction, the now familiar *mobilia sequuntur personam.* By analogy and without its application being questioned, this doctrine, obviously a rule of convenience, was adopted in the field of taxation, and the state of the domicile of the owner of personal property assumed juris-

diction to tax all of his property, tangible and intangible, regardless of its situs. In view of the relative unimportance of personal property, the fiction was adequate to satisfy the needs of the times.

The Industrial Revolution effected a tremendous increase in tangible personal property, and the growth of corporations a correspondingly great increase in intangible personal property. At the same time the functions of government increased and the states made greater efforts to reach this new source of revenue. The heavy tax burden thus imposed upon this now important item of wealth caused a partial reconsideration of the problem. It was pointed out that where tangible personal property had acquired a permanent situs in a state other than that of the domicile, it was eminently fair to permit the state of the situs to impose a tax, since the property and its owner enjoyed the protection of the laws of that state. Every real advantage of the ownership of such property was secured and protected by the state of the situs, and it was not at all unreasonable to permit that state to impose a tax. *Pullman's Palace Car Company* v. *Commonwealth of Pennsylvania,* 141 U. S. 18 (1891).

The state of the domicile of the owner, however, refused to abandon the fiction of *mobilia sequuntur personam* and continued to impose its own tax upon the same property upon the basis of domicile, and a new economic problem as to personal property was born—double taxation. For a time the constitutional validity of this practice went unquestioned—indeed as late as 1886 Mr. Justice Bradley considered it "hardly necessary to cite authorities on a point so elementary": *Coe* v. *Errol,* 116 U. S. 517 (1886).

With the rapid development of the Machine Age came an ever increasing burden of multiple taxation upon tangible personal property. Under a growing storm of economic protest, directed primarily against double taxation, our jurisprudence considered and developed new concepts of jurisdiction to tax. It was a foregone conclusion that the fiction would yield to reality and it was not surprising that it was determined that only the state of the situs had jurisdiction to tax tangible property. This Court had already held that the state of the domicile of the owner could not tax realty outside of the state, *Louisville & Jefferson Ferry Co.* v. *Kentucky*, 188 U. S. 385 (1903), and it was logical to treat tangible personal property with the same realism. Accordingly in *Union Refrigerator Transit Company* v. *Kentucky*, 199 U. S. 194 (1905), this Court held that tangible personal property that had acquired a permanent situs in a state other than the domicile of the owner was not subject to taxation in the domiciliary state. In so holding, the Court said (p. 202):

> "The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares, such, for instance, as roads, bridges, sidewalks, pavements, and schools for the education of his children. If the taxing power be in no position to render these services, or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another state, to which it may be said to owe an allegiance and to which it looks for protection, the

taxation of such property within the domicil of the owner partakes rather of the nature of an extortion than a tax, and has been repeatedly held by this court to be beyond the power of the legislature and a taking of property without due process of law. *Railroad Company* v. *Jackson*, 7 Wall. 262; *State Tax on Foreign-held Bonds*, 15 Wall. 300; *Tappan* v. *Merchants' National Bank*, 19 Wall. 490, 499; *Delaware &c. R. R. Co.* v. *Pennsylvania*, 198 U. S. 341, 358."

And continued later in the opinion as follows (page 204):

"It is also essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power. Not only is the operation of State laws limited to persons and property within the boundaries of the State, but property which is wholly and exclusively within the jurisdiction of another State, receives none of the protection for which the tax is supposed to be the compensation. This rule receives its most familiar illustration in the cases of land which, to be taxable, must be within the limits of the State. Indeed, we know of no case where a legislature has assumed to impose a tax upon land within the jurisdiction of another State, much less where such action has been defended by any court. It is said by this court in the *Foreign-held Bond case*, 15 Wall. 300, 319, that no adjudication should be necessary to establish so obvious a proposition as that property lying beyond the jurisdiction of a State is not a subject upon which her taxing power can be legitimately exercised.

The argument against the taxability of land within the jurisdiction of another State applies with equal cogency to tangible personal property beyond the jurisdiction. It is not only beyond the sovereignty of the taxing State, but does not and cannot receive

protection under its laws. True, a resident owner may receive an income from such property, but the same may be said of real estate within a foreign jurisdiction. Whatever be the rights of the State with respect to the taxation of such income, it is clearly beyond its power to tax the land from which the income is derived. As we said in *Louisville &c. Ferry Co.* v. *Kentucky*, 188 U. S. 385, 396: 'While the mode, form and extent of taxation are, speaking generally, limited only by the wisdom of the legislature, that power is limited by the principle inhering in the very nature of constitutional Government, namely, that the taxation imposed must have relation to a subject within the jurisdiction of the taxing Government.' "

It is significant that at no place in this opinion does it appear that there was double taxation present. Whether there was actual double taxation present is of no consequence because the principle of the case is so just, as well as so logical, and has become so firmly embedded in our jurisprudence that no one today would seriously contend that the state of the domicile of the owner could impose a property tax on tangible property that had acquired a situs in another state, even if the latter state did not impose a tax upon the property.

Within twenty years the principle of the *Union Refrigerator* case was developed still further and was extended in *Frick* v. *Pennsylvania*, 268 U. S. 473 (1925) to apply to the imposition of an inheritance tax upon tangible property which had acquired a situs in a state other than that of the domicile of the decedent. In the *Frick* case, Mr. Justice Van Devanter writing for a unanimous Court held (page 492):

> "The tax which it imposes is not a property tax, but one laid on the transfer of property on the death of the owner. This distinction is stressed by counsel for the State. But, to impose either tax, *the State must have jurisdiction over the thing that is taxed, and to impose either without such jurisdiction is mere extortion, and in contravention of due process of law.*"*

The law of jurisdiction to tax tangible property is now well settled, and it is clear that the only state having jurisdiction to impose property taxes or transfer inheritance taxes upon tangible property that has acquired a permanent situs elsewhere is the state of the situs. *Johnson Oil Refining Co.* v. *Oklahoma*, 290 U. S. 158 (1933); *City Bank Farmers Trust Co.* v. *Schnader*, 293 U. S. 112 (1934).

For purposes of tax jurisdiction no logical distinction can be made between tangible personal property that has acquired a permanent situs in a state other than that of the domicile, and intangible personal property that has acquired a business situs in a state other than that of the domicile. Analytically, ownership of tangible property is itself merely a collection of intangible rights that a person has with relation to some physical object. Similarly, ownership of intangible property is merely a collection of similar intangible rights that a person has with relation to other persons.

When the courts first considered the problem of intangible personal property, however, they were troubled by the impossibility of actually fixing any physical situs of intangibles, and relied exclusively upon *mobilia sequuntur personam*. In time, however, as in the case of tangibles, various states actually conferring benefits upon

* Italics ours.

intangibles and the owners thereof attacked the fiction and claimed jurisdiction to tax. As early as 1899 this Court held that the fiction must yield to reality and recognized and applied the concept of business situs of intangibles to support jurisdiction to tax. *New Orleans* v. *Stempel*, 175 U. S. 309 (1899); *Bristol* v. *Washington County*, 177 U. S. 133 (1900); *State Board* v. *Comptoir National D'Escompte*, 191 U. S. 388 (1903); *Metropolitan Life Insurance Company* v. *New Orleans*, 205 U. S. 395 (1907); *Liverpool and L. & G. Co.* v. *Board of Assessors*, 221 U. S. 346 (1911).

It must be remembered that at this time it was generally considered that there was no constitutional objection to taxing tangible or intangible property more than once, and consequently the foregoing decisions were no indication that the state of the domicile might not continue to impose taxes by employing the fiction. In fact this practice continued to flourish with reference to tangibles until the decision of this Court in the *Union Refrigerator* case placed tangible property, which had acquired a situs elsewhere, beyond the taxing jurisdiction of the state of the domicile (*supra*, p. 11).

In the case of tangible property possibilities of jurisdiction were rather definitely limited to physical situs and domicile, but as to intangibles the situation was infinitely more complex and there were many more possible theories of jurisdiction to tax. The result was therefore not merely double taxation but multiple taxation.

The plain truth of the matter is that it is impossible to attribute any actual physical situs to intangibles as such. Actual situs as to tangible property is an essential in the law of jurisdiction, because it is the state of the situs which

predominately protects the property and which permits the owner to enjoy his rights with respect thereto. To describe this situation with reference to intangibles the term "business situs" is employed. Where intangible personal property has been localized and is being used and beneficially employed under the laws and protection of one state, it is said that the intangible property has acquired a business situs in that state. One writer expresses this idea of tax situs of intangibles by saying that it is the place where the property is integrated in the body of the property of the state and where it becomes useful wealth.* Mr. Chief Justice Hughes defined the term in *New York ex rel. Whitney* v. *Graves*, 299 U. S. 366, at 372 (1937), where he said:

> "When we speak of a 'business situs' of intangible personal property in the taxing State we are indulging in a metaphor. We express the idea of localization by virtue of the attributes of the intangible right in relation to the conduct of affairs at a particular place. The right may grow out of the actual transactions of a localized business or the right may be identified with a particular place because the exercise of the right is fixed exclusively or dominantly at that place."

In view of the difficulties in fully developing this theory of tax situs for intangibles, the law of jurisdiction to tax intangibles did not keep pace in its development with the law as to tangibles, and it is not surprising therefore that in *Union Refrigerator Transit Co.* v. *Kentucky, supra*, the dictum of the Court indicated that intangibles should not be treated in the same manner as tangibles.

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* Harding, *Double Taxation of Property and Income*, Cambridge 1933.

It was at this stage in the devolpment of the law that this Court handed down its decision in *Cream of Wheat Co.* v. *County of Grand Forks*, 253 U. S. 325 (1920), where it held that intangibles were still taxable at the domicile of the owner on the basis of *mobilia sequuntur personam*, even though they had acquired a situs elsewhere.

The following year in *Citizens National Bank* v. *Durr*, 257 U. S. 99 (1921), the majority of the Court, relying upon *mobilia sequuntur personam*, sustained a personal property tax imposed by Ohio upon a New York Stock Exchange seat owned by a person domiciled in the State of Ohio and held that its decision would not be different even if it were assumed that the property had acquired a situs for taxation in New York. This case, however, brought forth one of the first indications that intangible personal property should be subject to taxation only in the state of its business situs. Mr. Justice Holmes in a dissent, in which Mr. Justice McReynolds and Mr. Justice Van Devanter joined, said (page 110):

> "The question whether a seat in the New York Stock Exchange is taxable in Ohio consistently with the principles established by this Court seems to me more difficult than it does to my brethren. All rights are intangible personal relations between the subject and the object of them created by law. But it is established that it is not enough that the subject, the owner of the right, is within the power of the taxing State. He cannot be taxed for land situated elsewhere, and the same is true of personal property permanently out of the jurisdiction. It does not matter, I take it, whether the interest is legal or equitable, or what the machinery by which it is reached, but the question is whether the object of the

right is so local in its foundation and prime meaning that it should stand like an interest in land. If left to myself I should have thought that the foundation and substance of the plaintiff's right was the right of himself and his associates personally to enter the New York Stock Exchange building and to do business there. I should have thought that all the rest was incidental to that and that that on its face was localized in New York. If so, it does not matter whether it is real or personal property or that it adds to the owner's credit and facilities in Ohio. The same would be true of a great estate in New York land."

It is important to note, moreover, that when *Cream of Wheat Company* v. *County of Grand Forks* and *Citizen's National Bank* v. *Durr* were decided, the law of jurisdiction to tax had not yet fully developed even as to tangible property. It was not until 1925 that the principle of the *Union Refrigerator* case was extended to an inheritance tax in *Frick* v. *Pennsylvania*, 268 U. S. 473 (*supra*, p. 13), and the doctrine of *mobilia sequuntur personam* was further limited. By 1925, therefore, the law of jurisdiction to tax tangible personal property had fully developed, and it was clear that where property had acquired a permanent situs elsewhere the state of the domicile no longer had jurisdiction to tax on the basis of *mobilia sequuntur personam*.

The development of the law of jurisdiction to tax intangibles from this point on demonstrates that the logic and reasonableness of the rule of jurisdiction to tax tangibles applies with equal force to the taxation of intangibles which have acquired a business situs elsewhere.

Thus in 1929 in *Safe Deposit & Trust Company* v. *Virginia*, 280 U. S. 83, Mr. Justice McReynolds, speaking for

the majority of the Court, attacked the arbitrary application of *mobilia sequuntur personam* to intangibles. In holding that the state of the domicile of the equitable owner of intangible property situated elsewhere could not impose a tax on such property, he said (page 92):

> "Ordinarily this Court recognizes that the fiction of *mobilia sequuntur personam* may be applied in order to determine the situs of intangible personal property for taxation. *Blodgett* v. *Silberman*, 277 U. S. 1. But the general rule must yield to established fact of legal ownership, actual presence and control elsewhere, and ought not to be applied if so to do would result in inescapable and patent injustice, whether through double taxation, or otherwise. *State Board of Assessors* v. *Comptoir National d'Escompte*, 191 U. S. 388, 404; *Buck* v. *Beach*, 206 U. S. 392, 408; *Liverpool & L. & G. Ins. Co.* v. *Orleans Assessors*, 221 U. S. 346, 354; *Maguire* v. *Trefry*, 253 U. S. 12, 17. * * *
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> A statute of a State which undertakes to tax things wholly beyond her jurisdiction or control conflicts with the Fourteenth Amendment [citations omitted].
>
> Tangible personal property permanently located beyond the owner's domicile may not be taxed at the latter place. *Union Refrig. Transit Co.* v. *Kentucky*, *supra*; *Frick* v. *Pennsylvania*, *supra*. Intangible personal property may acquire a taxable situs where permanently located, employed and protected. *New Orleans* v. *Stempel*, 175 U. S. 309; *Bristol* v. *Washington County*, 177 U. S. 133; *State Board of Assessors* v. *Comptoir National d'Escompte*, 191 U. S. 388; *Metropolitan Life Ins. Co.* v. *New Orleans*, 205 U. S. 395; *Liverpool & L. & G. Ins. Co.* v. *Orleans Assessors*, 221 U. S. 346.

> Here we must decide whether intangibles—stocks, bonds—in the hands of the holder of the legal title with definite taxable situs at its residence, not subject to change by the equitable owner, may be taxed at the latter's domicile in another state. We think not. The reasons which led this court in *Union Refrig. Transit Co.* v. *Kentucky*, 199 U. S. 194, and *Frick* v. *Pennsylvania*, 268 U. S. 473, to deny application of the maxim *mobilia sequuntur personam* to tangibles apply to the intangibles in appellant's possession. They have acquired a situs separate from that of the beneficial owners. The adoption of a contrary rule would 'involve possibilities of an extremely serious character' by permitting double taxation, both unjust and oppressive. And the fiction of *mobilia sequuntur personam* 'was intended for convenience, and not to be controlling where justice does not demand it.' "

Again, definite modification of the law of jurisdiction to tax was made by this Court in *Farmers' Loan & Trust Company* v. *Minnesota*, 280 U. S. 204 (1930) with respect to transfer and inheritance taxes upon intangibles. In that case a succession tax was levied by the State of Minnesota upon Minnesota bonds which had been owned by a domiciliary of New York. It was not claimed that the bonds had acquired a business situs in Minnesota, but it was argued that the bonds had a tax situs there since they were debts of a Minnesota corporation. The majority of the Court, intent upon eliminating the vices of multiple taxation, held the Minnesota tax invalid and expressly overruled *Blackstone* v. *Miller*, 188 U. S. 189 (1903), which had long been relied upon as supporting the theory that intangibles might be taxed constitutionally both at the domicile of the owner and elsewhere. Mr. Justice McReynolds again writing for a majority of the Court held (page 209):

"*Blackstone* v. *Miller, supra,* and certain approving opinions, lend support to the doctrine that ordinarily choses in action are subject to taxation both at the debtor's domicile and at the domicile of the creditor; that two States may tax on different and more or less inconsistent principles the same testamentary transfer of such property without conflict with the Fourteenth Amendment. The inevitable tendency of that view is to disturb good relations among the States and produce the kind of discontent expected to subside after establishment of the Union. The Federalist, No. VII. The practical effect of it has been bad; perhaps two thirds of the States have endeavored to avoid the evil by resort to reciprocal exemption laws. It has been stoutly assailed on principle. Having reconsidered the supporting arguments in the light of our more recent opinions, we are compelled to declare it untenable. *Blackstone* v. *Miller* no longer can be regarded as a correct exposition of existing law; and to prevent misunderstanding it is definitely overruled.

Four different views concerning the situs for taxation of negotiable public obligations have been advanced. One fixes this at the domicile of the owner; another at the debtor's domicile; third at the place where the instruments are found—physically present; and the fourth within the jurisdiction where the owner has caused them to become integral parts of a localized business. If each state can adopt any one of these and tax accordingly, obviously, the same bonds may be declared present for taxation in two, or three, or four places at the same moment. Such a startling possibility suggests a wrong premise."

He indicated clearly that the basic difficulty with the attempt on the part of Minnesota to tax was the lack of jurisdiction, a primary requisite of all taxation, saying (page 210):

> "In this Court the presently approved doctrine is that no State may tax anything not within her jurisdiction without violating the Fourteenth Amendment [citations omitted]. Also, no State can tax the testamentary transfer of property wholly beyond her power, *Rhode Island Trust Co.* v. *Doughton*, 270 U. S. 69, or impose death duties reckoned upon the value of tangibles permanently located outside her limits. *Frick* v. *Pennsylvania*, 268 U. S. 473. These principles became definitely settled subsequent to *Blackstone* v. *Miller* and are out of harmony with the reasoning advanced to support the conclusion there announced.
>
> At this time it cannot be assumed that tangible chattels permanently located within another State may be treated as part of the universal succession and taken into account when estimating the succession tax laid at the decedent's domicile. *Frick* v. *Pennsylvania* is to the contrary.
>
> Nor is it permissible broadly to say that notwithstanding the Fourteenth Amendment two States have power to tax the same personalty on different and inconsistent principles or that a State always may tax according to the fiction that in successions after death *mobilia sequuntur personam* and domicile govern the whole."

The problem still remained, however, as to which state could tax where intangible personal property had acquired a business situs in a state other than that of the owner's domicile. Was such intangible property only taxable by the state of the situs? The language of the Court even then forecast an affirmative answer (page 211):

> "While debts have no actual territorial situs we have ruled that a State may properly apply the rule *mobilia sequuntur personam* and treat them as

localized at the creditor's domicile for taxation purposes. Tangibles with permanent situs therein, and their testamentary transfer, may be taxed only by the State where they are found. And, we think, the general reasons declared sufficient to inhibit taxation of them by two States apply under present circumstances with no less force to intangibles with taxable situs imposed by due application of the legal fiction. Primitive conditions have passed; business is now transacted on a national scale. A very large part of the country's wealth is invested in negotiable securities whose protection against discrimination, unjust and oppressive taxation, is matter of the greatest moment. Twenty-four years ago *Union Refrig. Transit Co.* v. *Kentucky, supra,* declared —'. . . in view of the enormous increase of such property [tangible personalty] since the introduction of railways and the growth of manufactures, the tendency has been in recent years to treat it as having a *situs* of its own for the purpose of taxation, and correlatively to exempt [it] at the domicile of the owner.' And, certainly, existing conditions no less imperatively demand protection of choses in action against multiplied taxation whether following misapplication of some legal fiction or conflicting theories concerning the sovereign's right to exact contributions. For many years the trend of decisions here has been in that direction.

Taxation is an intensely practical matter and laws in respect of it should be construed and applied with a view of avoiding, so far as possible, unjust and oppressive consequences. We have determined that in general intangibles may be properly taxed at the domicile of their owner and we can find no sufficient reason for saying that they are not entitled to enjoy an immunity against taxation at more than one place similar to that accorded to tangibles. The

difference between the two things, although obvious enough, seems insufficient to justify the harsh and oppressive discrimination against intangibles contended for on behalf of Minnesota."

The Court was careful to note several of its decisions which (page 213):

> "* * * *recognize the principle that choses in action may acquire a situs for taxation other than at the domicile of their owner if they have become integral parts of some local business.** The present record gives no occasion for us to inquire whether such securities can be taxed a second time at the owner's domicile."

The holding of this case was confirmed in *Baldwin* v. *Missouri*, 281 U. S. 586 (1930) and *Beidler* v. *South Carolina Tax Commission*, 282 U. S. 1 (1930), but in neither case did it appear that the intangibles had acquired a situs in another state, and accordingly the instant problem was left unanswered, although in each case the inference is apparent that if the intangibles had acquired a situs they would be taxable only there.

The problem appears again two years later in the case of *First National Bank of Boston* v. *Maine*, 284 U. S. 312 (1932) but the Court found no occasion to attempt a solution. Mr. Justice Sutherland said (page 331):

> "We do not overlook the possibility that shares of stock, as well as other intangibles, may be so used in a state other than that of the owner's domicile as to give them a *situs* analogous to the actual *situs* of tangible personal property. See *Farmers Loan Company* case, *supra*, at p. 213. That question heretofore

* Italics ours.

has been reserved, and it still is reserved to be disdisposed of when, if ever, it properly shall be presented for our consideration."

The rule that certain kinds of intangibles such as bonds, notes and credits are subject to inheritance taxes only by the domiciliary state in the absence of a business situs was here extended to apply to stocks.

Approving the line of decisions indicating that intangible property which has acquired a business situs could be constitutionally taxed in only one jurisdiction, this Court in *Wheeling Steel Corporation* v. *Fox*, 298 U. S. 193 (1936) sustained the right of the State of West Virginia to impose an *ad valorem* property tax on the intangible property of a Delaware corporation that had acquired a business situs at the commercial domicile of the corporation in West Virginia. In sustaining this tax, Mr. Chief Justice Hughes, speaking for the entire Court, first emphasized the necessity of establishing jurisdiction to tax, saying (page 208):

> "We have held that it is essential to the validity of such a tax, under the due process clause, that the property shall be within the territorial jurisdiction of the taxing state",

and then continued as follows (page 209):

> "When we deal with intangible property, such as credits and choses in action generally, we encounter the difficulty that by reason of the absence of physical characteristics they have no situs in the physical sense, but have the situs attributable to them in legal conception. Accordingly we have held that a State may properly apply the rule *mobilia sequuntur personam* and treat them as localized at the owner's domicile for purposes of taxation. *Farmers Loan &*

Trust Co. v. *Minnesota*, 280 U. S. 204, 211. *And having thus determined 'that in general intangibles may be properly taxed at the domicile of their owner,' we have found 'no sufficient reason for saying that they are not entitled to enjoy an immunity against taxation at more than one place similar to that accorded to tangibles.'* Id.*, p. 212. The principle thus announced in *Farmers Loan & Trust Co.* v. *Minnesota* has had progressive application. [Citations omitted.] But despite the wide application of the principle, an important exception has been recognized.

In the case of tangible property, the ancient maxim, which had its origin when personal property consisted in the main of articles appertaining to the person of the owner, yielded in modern times to the 'law of the place where the property is kept and used.' *First National Bank* v. *Maine, supra.* It was 'in view 'of the enormous increase of such property since the introduction of railways and the growth of manufactures' that it came to be regarded as 'having a situs of its own for the purpose of taxation, and *correlatively to* [*be*] *exempt at the domicile of its owner.*'* *Union Refrigerator Transit Co.* v. *Kentucky, supra*, p. 207. There has been an analogous development in connection with intangible property by reason of the creation of choses in action in the conduct by an owner of his business in a State different from that of his domicile [citations omitted].

These cases, we said in *Farmers Loan & Trust Co.* v. *Minnesota, supra*, p. 213, 'recognize the principle that choses in action may acquire a situs for taxation other than at the domicile of their owner if they have become integral parts of some local business.' We adverted to this reservation in *Beidler*

* Italics ours.

v. *South Carolina Tax Comm'n, supra*, p. 8, and in *First National Bank* v. *Maine, supra*, p. 331."

In *First Bank Stock Corporation* v. *State of Minnesota*, 301 U. S. 234 (1937), this Court once again affirmed the doctrine that where intangibles have acquired a business situs they are taxable by the state of such situs. Mr. Justice Stone in delivering the opinion of the Court said (page 238):

> "The doctrine that intangibles may be taxed at their business situs, as distinguished from the legal domicile of their owner, has usually been applied to obligations to pay money, acquired in the course of a localized business [citations omitted]. But it is equally applicable to shares of corporate stock which, because of their use in a business of the owner, may be treated as localized, for purposes of taxation, at the place of the business [citations omitted]. Appellant's entire business in Minnesota is founded on its ownership of the shares of stock and their nse as instruments of corporate control. They are as much 'integral parts' of the local business as accounts receivable in a merchandising business, or the bank accounts in which the proceeds of the accounts receivable are deposited upon collection. Compare *Wheeling Steel Corp.* v. *Fox, supra*, 212-214. Thus identified with the business conducted by appellant in Minnesota, they are as subject to local property taxes as they would be if the owner were a private individual domiciled in the state."

In concluding his opinion he set forth the basic reasons for the principle contended for by appellant here when he said (page 241):

> "The economic advantages realized through the protection, at the place of domicil, of the ownership

> of rights in intangibles, the value of which is made the measure of the tax, bear a direct relationship to the distribution of burdens which the tax effects. These considerations support the taxation of intangibles at the place of domicil, *at least where they are not shown to have acquired a business situs elsewhere,** as a proper exercise of the power of government. Like considerations support their taxation at their business situs, for it is there that the owner in every practical sense invokes and enjoys the protection of the laws, and in consequence realizes the economic advantages of his ownership."

In *Smith* v. *Ajax Pipe Line Co.*, 87 F. (2d) 567 (1937), *certiorari denied* 300 U. S. 677 (1937), a personal property tax levied by the State of Missouri on the bank deposits in New York of a Delaware corporation were sustained upon the principle that these deposits had acquired a business situs at the commercial domicile of the owner in Missouri. Circuit Judge Stone, after reviewing the development of the law of taxation on personal property, concluded that (page 571):

> "The final step was to declare that there was but one situs for taxation of intangibles."

In view of the foregoing authorities, it is apparent that this Court does not presently regard *Cream of Wheat Company* v. *County of Grand Forks*, 253 U. S. 325 (1920) and *Citizen's National Bank* v. *Durr*, 257 U. S. 99 (1921) as controlling with reference to jurisdiction to tax intangibles which have acquired a business situs. This is indicated by the decision of this Court in *New York ex rel. Whitney* v. *Graves*, 299 U. S. 366, where Mr. Chief Justice Hughes in

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* Italics ours.

commenting upon the decision in *Citizen's National Bank v. Durr, supra*, remarked (page 373):

> "• • • what the Court said with respect to double taxation must be read in the light of the decisions in *Farmers Loan & Trust Co.* v. *Minnesota, supra*, and later cases upon that point. See *Wheeling Steel Corp.* v. *Fox, supra.*"

It is therefore submitted that the most recent opinions of this Court have set forth certain basic principles of jurisdiction to tax, which lead to the inescapable conclusion that where intangibles have acquired a business situs, the state of the situs only may tax and the state of the domicile cannot.

Since the concept of business situs with reference to intangibles is now well established, it would seem clear that there is no longer any reason why intangibles should be here treated differently than tangibles. Indeed, all of the considerations which deny to the domicile the jurisdiction to tax tangibles that have a situs elsewhere, compel the adoption of a similar rule with reference to intangibles. This result has already been reached by several of our state courts following the trend of the decisions of this Court already referred to.

Thus, the Indiana Supreme Court in *Miami Coal Co.* v. *Fox*, 203 Ind. 99 (1931), held (page 113):

> "It has been suggested by the Supreme Court of the United States that, if the principles of taxation were homogeneous throughout the country and the individual states, property would be subject to taxation in but one of such jurisdictions. This is the foundation for the inference that property, such as here in question, ought to have one situs and one

situs only. Either the gaining of a so-called business situs should emancipate the property from taxation at the domicile of the owner, or the judicial construction of the principle upon which the so-called business situs is founded should be abolished. *Kidd* v. *Alabama* (1903), 188 U. S. 730, 732, 23 S. Ct. 401, 47 L. ed. 669; *Hawley* v. *City of Malden* (1914), 232 U. S. 1, 34 S. Ct. 201, 58 L. ed. 477, Ann. Cas. 1916C, 842.

The contention of appellees under the last question stated is peculiar and unique in contending that intangible personal property may have two situses, one a business situs and the other a taxable situs.

Admitting that the property has a business situs in Illinois and a taxable situs in Indiana, the only foundation for the property being subject to taxation is the ancient maxim *mobilia sequuntur personam*. The seed of this maxim was not begotten by taxation. The rule is but a legal fiction to the effect that for legal purposes the situs or home of personal property is always at the domicile of its owner. But this maxim may not be a premise or used in reasoning to the determination of the situs of the property for the purpose of taxation. This is exemplified by the holding of the United States Supreme Court that the taxation of tangible personal property in the jurisdiction of the domicile of its owner, when it has an established legal situs in another jurisdiction, offends the Fourteenth Amendment to the United States Constitution. *Safe Deposit, Etc., Co.* v. *Virginia* (1929), 280 U. S. 83, 92, 50 S. Ct. 59, 74 L. ed. 180, 67 A. L. R. 386. And it has been further held that this principle applies to intangible as well as to tangible personal property. *Marshall-Wells Hardware Co.* v. *Multnomah County, supra,* page 472. By virtue of the statutes cited, if the same statutes were in force and effect in Illinois,

intangible personal property belonging to a person domiciled in Indiana who was connected with the business in Illinois would be taxable in Illinois under Indiana decisions. *Herron* v. *Keeran, supra; Buck* v. *Miller, supra.*

If the contention of appellees were true, the property could also be lawfully taxed in Indiana. Indiana has assessed for taxation intangible personal property localized in this state, the owner having his domicile in another jurisdiction. In permitting such taxation, as was done with the property in the case of *Buck* v. *Miller, supra,* it is tantamount to saying that the taxation situs of the intangible personal property for the purpose of taxation was within the jurisdiction of Indiana. We cannot, without excluding justice from our conscience, adjudge anything different concerning the property of our own citizens similarly situated in other states. *And it does not matter to reach such a conclusion whether such property was taxed in such foreign jurisdiction or not, or even whether it was subject to taxation.** Appellees' contention that the property was within the jurisdiction of Indiana subject to taxation even though it gained a business situs in Illinois must be held as not well founded."

Again, in *Commonwealth of Kentucky* v. *West India Oil Refining Company,* 138 Ky. 828 (1910), the Court was considering the validity of a personal property tax levied against a Kentucky corporation which had a "principal place of business" in the state. The proofs showed that the real business of the company and its commercial situs were in Cuba and Porto Rico. The tax statute specifically provided that the entire personal property, tangible and intan-

* Italics ours.

gible, of corporations organized in the state should be taxed wherever the property might be. The Court refused to follow the argument that Kentucky could tax as the state of the domicile, and pointed out the basic difficulty was the lack of jurisdiction, holding (page 834):

> "The question in this case is not therefore whether the property in question has been taxed in Cuba or Porto Rico. The question is simply, Is it taxable here? If it has not been taxed there, it may still be taxed there. If not, that fact will not confer jurisdiction to tax it here. * * *
>
> The business of the corporation was carried on entirely outside of Kentucky. Its property, though intangible, had no situs in Kentucky. It was never here. It was taxable where the business was carried on. If it could be taxed there and elsewhere, it would be twice taxed. It cannot be taxed here unless within the jurisdiction of the state under the repeated decisions of the United States Supreme Court. No practical distinction can be drawn between the money of the company in its office in Cuba or that deposited in a bank there, or that due on its books for its product which has been sold and not paid for. It is all employed in the business in Cuba or Porto Rico. It has its situs there. It has no situs in Kentucky."

The principle of this case was applied in *Commonwealth v. B. F. Avery & Sons*, 163 Ky. 828 (1915), where a tax was imposed upon certain intangible property of a domestic corporation. The property had become localized with the business of the corporation's local branches outside of the state. The Kentucky Court held that the property had a business situs outside of the state and therefore was beyond the tax jurisdiction of Kentucky, saying (page 829):

"It is no longer open to dispute that tangible personal property actually present in another state so as to acquire there a situs for taxation, is immune from taxation at the domicile of the owner. *D. L. & W.* v. *Pennsylvania,* 198 U. S. 341; *Union Ref. Co.* v. *Kentucky,* 199 U. S. 194, 26 Sup. Ct. 36, 50 L. ed. 150, 4 Ann. Cas. 493. And this rule has been extended to accounts receivable. *Commonwealth* v. *West India Oil Refining Co.,* 138 Ky. 828, 129 S. W. 301. In the last named case, however, the corporation employed its whole capital outside of this state; but we are unable to see any practical distinction between such state of fact and that existing in the present case, where the corporation employs only part of its capital in other states. As to that part so employed there is immunity from taxation in this state."

The holding of *Commonwealth of Kentucky* v. *West India Oil Refining Co.,* 138 Ky. 828 (*supra*) was followed in *Commonwealth of Kentucky* v. *Madden's Ex'r.,* 265 Ky. 684 (1936) where the state tried to tax a domiciliary upon his interest in a partnership doing business in New York. The court held that the intangible property had acquired a situs in New York and was not within the tax jurisdiction of Kentucky, saying (page 686):

"Any doubt that may have existed by virtue of the recent decisions of the Supreme Court of the United States, as to whether or not the maxim of '*mobilia sequuntur personam*' would be invariably applied to intangible property and 'business situs' no longer recognized, has been set at rest by the decision of that court in the case of *Wheeling Steel Corp.* v. *Fox,* 56 S. Ct. 773, 776; 80 L. ed. 1143 (decided May 18, 1936) * * *

Applying these principles to the case at bar, we are compelled to recognize that the business of the

> Madden partnership was located in New York. All of the partnership accounts were carried with brokers there, the securities purchased and sold were carried in the names of New York brokers, and the trading was almost universally carried on in person by Mr. Madden at the brokerage offices. In fact, the testimony indicates that he was more often sojourning in New York than in his technical legal residence in Kentucky. We conclude, therefore, that Mr. Madden's interest in the assets of the partnership was localized in New York and beyond the power of Kentucky to tax. His interest in the going partnership was not a thing apart from the partnership itself."

The Supreme Court of the State of Virginia had occasion to consider the problem in *Commonwealth* v. *Appalachian Electric Power Co.*, 159 Va. 462 (1932), *cert. denied* 288 U. S. 613 (1933). In that case a Virginia corporation had created a trust in New York conveying all of its property, tangible and intangible, to the New York trustee. The State of Virginia attempted to tax the intangible personal property upon *mobilia sequuntur personam*. The Court held that the intangibles had acquired a business situs in New York and were no longer within the tax jurisdiction of Virginia, saying (page 465 *et seq.*):

> "• • • in our opinion, the recent decisions of the Supreme Court of the United States extending the application of the Fourteenth Amendment to the Constitution of the United States are clearly decisive of the case. • • •
>
> The conclusions from these opinions summarized by counsel for petitioner seem inescapable: (1) that no property can be subjected to taxation by more than one State; (2) that this rule likewise applies to a tax on inheritances; (3) that the tax situs of tangi-

bles (like real estate) is in the State where they are located, the fiction of *mobilia sequuntur personam* being no longer applicable to tangibles; (4) that where intangibles form the basis of an inheritance tax this fiction applies and such tax is properly imposed in the State of the domicile of the decedent; (5) that, where intangibles are sought to be taxed, the fiction of *mobilia sequuntur personam* may be applied, but this fiction must give way to the fact of legal title, possession and control in another state. • • •

Title, possession and control of the property, for all practical purposes, are beyond the territorial limits of Virginia and within the territorial limits of New York, which under the decisions heretofore cited gives the property in question a taxable situs in the latter State. The fact that interest has been and will be received by petitioner in Virginia, so long as it is not in default, does not affect the right of the State of New York to impose a tax upon this property. [Citations omitted.]"

The Court clearly indicated that the problem was one of jurisdiction and not of double taxation (page 471):

"The fact that the State of New York imposes no such tax on this class of property is immaterial. The controlling question is, has that State the right to tax the property? We think it has. If so, Virginia, under the decisions, has no such right."

A similar conclusion was reached by the Supreme Court of Montana in *State* v. *Harrington,* 68 Mont. 1 (1923), *rehearing denied* (1923). In this case Montana assessed a personal property tax against one of its domiciliaries for stock which he used in a brokerage business in New York.

The court in an exhaustive and well-considered opinion held that the intangibles had acquired a business situs in New York and were beyond the tax jurisdiction of Montana.

After a careful review of the authorities, the court held (page 28):

> "But as indicated above, there is a well-recognized exception to the general rule that intangibles have their *situs* at the domicile of their owner, as where there is such a combination of circumstances 'as produce what is referred to in the books as a business *situs* as distinguished from the domicile of the owner.' [Citations omitted.]
>
> The general principle underlying this exception has been recognized by the Supreme Court of the United States in many cases [citations omitted], and so far as we are aware has never been denied by that court. * * *
>
> In the instant case it is unquestioned that the Thornton shares have a business *situs* in the state of New York; they are actually there and always have been. Under the admitted facts it must be held under the policy so long maintained in the territory and state of Montana, which we believe to be consonant with the true principles governing taxation—a policy which frowns upon double taxation in any form, and which simply demands of persons a just contribution to the support of the government under which they enjoy the protection which makes their business possible—the assessment of the Thornton stocks is not commanded."

A month after this opinion was rendered the Attorney General of Montana moved for a rehearing on the ground that the decision should be different since New York did not tax the property and there was consequently no double

taxation involved. The Court denied the motion, clearly indicating that it conceived the problem to be one of jurisdiction and not of double taxation. The Court held (page 32):

> "The only question presented or which could be presented to us in this case is whether under our laws the stocks are subject to the taxing jurisdiction of this state. Upon the agreed facts as counsel have made up the record, there is not a Montana dollar invested in the Thornton stocks. As a fact, as distinguished from fiction, they are as foreign to our jurisdiction as if they were cattle browsing upon the Adirondack hills. The stocks were bought with New York money, and are part of a New York business. Yet in view of these facts the attorney general asserts that the court's opinion is not consonant with the trend of modern authority. In this he is in error; the contrary is the fact. As noted in the opinion, the ancient fiction *mobilia sequuntur personam*, while satisfactory under the primitive conditions of the middle ages, is not suited to modern business conditions as a rule of universal application. The law has developed progressively beyond the narrow limits of the maxim. The fact is that the rule growing out of the business *situs* of intangibles, as distinguished from the domicile of the owner, is not only consistent with the trend of modern judicial authority, but is of well-nigh universal application in this country."

The New York Court of Appeals in *Matter of Brown*, 274 N. Y. 10 (1937) (*reargument denied* June 1937, 274 N. Y. 634) in setting aside an inheritance tax imposed upon the intangibles of the decedent domiciled in New York which had acquired a business situs in Colorado said (page 21):

> "It is clear that it is intended to include within the gross estate of a decedent domiciled within the State of New York at the time of his death intangible property *wherever situate*, without reference to the fact that it may have acquired and had an actual or business *situs* outside of the State of New York. The state has no power to tax property located beyond its jurisdiction. (*Matter of Swift, supra.*) To the extent that it has attempted to do so, it must be held that the statute in question is in violation of the due process provision of the Fourteenth Amendment, and is unconstitutional and void."

Other decisions supporting these views are *Middlekauff* v. *Galloway*, 151 Ore. 671 (1935); *Buck* v. *Board of Com'rs. of Miami County*, 103 Kan. 270 (1918); *Poppleton* v. *Yamhill County*, 18 Ore. 469 (1890); *Mayor and City Council of Baltimore* v. *Gibbs*, 166 Md. 364 (1934), *cert. denied* 293 U. S. 559 (1934); *Nashville Trust Co.* v. *Stokes* (Tenn.) 118 S. W. (2d) 228 (1938).

The concepts of jurisdiction set forth in the foregoing decisions of this Court and of the state courts are sound. They demonstrate that when intangibles have acquired a business situs there is no longer any reasonable basis for taxing them upon the theory of *mobilia sequuntur personam*. The fiction can be employed to give jurisdiction to tax only where the property sought to be taxed has no situs. Where intangibles have acquired a business situs, as in this case, the reason for the employment of the fiction no longer obtains. It follows here that the fiction must be abandoned and the jurisdiction to tax denied. It is therefore submitted that the intangibles here taxed are no longer within the tax jurisdiction of the State of New Jersey, and

the judgment of the Court of Errors and Appeals of New Jersey sustaining the imposition of the property tax upon this intangible property should be reversed.

B.

The Tax Domicile of the Appellant Is in New York and New Jersey Therefore Has No Jurisdiction to Tax.

Recent decisions of this Court indicate that New Jersey has no jurisdiction to tax appellant's intangible property by *mobilia sequuntur personam*, because appellant's commercial domicile is in New York.

Corporations for many purposes are said to be domiciled in the state of their incorporation, but this is a fiction which results in manifest incongruity in taxation where a corporation has acquired a commercial domicile elsewhere.

The considerations which may be urged to support the jurisdiction of the domicile to tax natural persons do not apply to corporations. The domicile of a natural person is where he makes his home, where he ordinarily spends most of his time and enjoys most of his property.

The registered office of a New Jersey corporation, however, which has its commercial domicile in New York can hardly be compared to the domicile of a natural person. The true home of this corporation, insofar as it can be said to have a home, is in New York at its commercial domicile. It is there that the vital acts of its existence are carried on.

Can New Jersey attribute to itself as the chartering state the entire intangible wealth of the corporation? Admittedly, New Jersey has given appellant its corporate existence, but this cannot suffice to establish jurisdiction to tax intangibles of a corporation which has acquired a commercial domicile elsewhere. It is reasonable to conclude

therefore that for purposes of intangible property taxation jurisdiction cannot be accorded to New Jersey upon the basis of corporate creation alone.

Giving due consideration to the economic facts of corporate existence in present day society, it is submitted that the appellant's taxable domicile is in New York and that jurisdiction to tax its intangible property cannot be imputed to New Jersey by the fiction *mobilia sequuntur personam.*

This conclusion is supported by a number of recent decisions. In *Wheeling Steel Corporation* v. *Fox,* 298 U. S. 193 (1936), *supra,* p. 25, Mr. Chief Justice Hughes writing for a unanimous court held (page 211):

> "The Corporation complied with the laws of the State of its creation in designating its 'principal' office in that State. It is manifest that this designation, while presumably sufficient for the purpose, was a technical one and that the office is not a principal office so far as the actual conduct of business is concerned. While a duplicate stock ledger and records of transactions with respect to capital stock are maintained in Delaware, the business operations of the Corporation are conducted outside that State. The office in Delaware is maintained through the service of an agency organized to furnish this convenience to corporations of that description. To attribute to Delaware, merely as the chartering State, the credits arising in the course of the business established in another State, and to deny to the latter the power to tax such credits upon the ground that it violates due process to treat the credits as within its jurisdiction, is to make a legal fiction dominate realities in a fashion quite as extreme as that which would attribute to the chartering State

all the tangible possessions of the Corporation without regard to their actual location."

* * * * * *

"The Corporation established in West Virginia what has aptly been termed a 'commercial domicile.'"

Again in *First Bank Stock Corporation* v. *Minnesota*, 301 U. S. 234 (1937), *supra*, p. 27, Mr. Justice Stone delivering the opinion of a unanimous Court said (page 237):

"Appellant is to be regarded as legally domiciled in Delaware, the place of its organization, and as taxable there upon its intangibles, see *Cream of Wheat Co.* v. *Grand Forks*, 253 U. S. 325, 328; *Johnson Oil Refining Co.* v. *Oklahoma*, 290 U. S. 158, 161; *Virginia* v. *Imperial Coal Sales Co.*, 293 U. S. 15, 19, *at least in the absence of activities identifying them with some other place as their 'business situs.'** But it is plain that the business which appellant carries on in Minnesota, or directs from its offices maintained there, is sufficiently identified with Minnesota to establish a 'commercial domicil' there, and to give a business situs there, for purposes of taxation, to intangibles which are used in the business or are incidental to it, and have thus 'become integral parts of some local business.' *Wheeling Steel Corp.* v. *Fox*, 298 U. S. 193, 210; see *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204, 213; *Beidler* v. *South Carolina Tax Comm'n*, 282 U. S. 1, 8; *First National Bank* v. *Maine*, 284 U. S. 312, 331."

The principle here contended for was recognized and approved in *In re United Carbon Co. Assessment*, 118 W. Va. 348 (1937), where the Court held (page 357):

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* Italics ours.

> "In fact, it seems to us that the trend of the modern cases, although we confess that it has never been explicitly held, is to the effect that, for tax purposes, a corporation may acquire a domicile in a state other than the state of its incorporation. Where it clearly appears that a corporation has its main plant and principal offices for the transaction of business in a state where its executive officers perform their duties so that the practical corporate being centers its functions there, we see no reason for saying that it is to be presumed that the situs of its personal property is another state under the laws of which it holds its charter, where it does nothing more than maintain a technical principal office. It seems to us that this is the necessary import of the decision in the *Wheeling Steel Case.*"

See also *Smith* v. *Ajax Pipe Line Co.*, 87 F. (2d) 567 (1937) *cert. denied*, 300 U. S. 677 (1937).

These decisions lead to the conclusion that for tax purposes a corporation may acquire a domicile in a state other than the state of its incorporation. This result would be, it is submitted, eminently reasonable and at the same time it would afford recognition to the fact that the only real domicile of a corporation is its commercial or business domicile. It has no domicile in the ordinary meaning of that word. A natural person may have, and frequently has, his domicile at a place other than the situs of his business. This is so because he normally has a private life entirely distinct from his business life. A corporate person, on the other hand, is incapable of engaging in any activity dissociated from the business for which it is incorporated. It has no dual existence. It functions only in a business or commercial capacity. It follows therefore that the only real domicile of a corporation is its commercial domicile.

It is not disputed that appellant's commercial domicile is in New York. For the reasons just mentioned, it is submitted that for purposes of property taxation its only real domicile is located there. Since appellant no longer has a domicile in the State of New Jersey in any real sense of the term, there are no reasonable grounds for permitting New Jersey to impose a tax on the basis of *mobilia sequuntur personam*. In fact if the maxim is to be applied at all, which is unnecessary in the present case since the intangibles have acquired a business situs in New York where they may be taxed, it should be applied realistically to New York where appellant has its taxable domicile.

For the reasons urged herein, it is submitted that the judgment of the Court of Errors and Appeals of New Jersey in sustaining the tax upon appellant's intangible property should be reversed.

C.

The Fact That the State of New York Has Not Exercised Its Jurisdiction to Tax Does Not Confer on New Jersey Jurisdiction to Tax.

The respondent and the courts below have attached significance to the fact that the appellant pays no property taxes in New York, although it is not disputed that the appellant pays premium taxes in New York, and may under the Federal Constitution be subjected to personal property taxes in New York.

It is submitted that this view is mistaken and entirely misconceives appellant's argument. Appellant does not contend that New Jersey is without jurisdiction to tax because double taxation exists, although it is true that a holding that New Jersey has jurisdiction to tax will permit

double taxation. The appellant's contention is that since its commercial domicile and the business situs of the property here taxed are entirely in New York the maxim *mobilia sequuntur personam* is not applicable and therefore New Jersey has no jurisdiction to tax.

The respondent's view is erroneous in that it sets up double taxation as a principle of jurisdiction, whereas in fact double taxation has merely been an evil which has clarified and developed the law of jurisdiction to tax.

This has also been the case with reference to tangible property where for a time some courts placed great emphasis upon the presence of the *possibility* of double taxation. Surely there can be no doubt that today tangible property, which has acquired a business situs in a state other than that of the domicile of the owner, is taxable only at such situs. No one would contend that if the situs failed to exercise its jurisdiction, that thereby jurisdiction and a constitutional basis to tax was conferred upon the state of the domicile.

The fact that there is double taxation, or the fact that the propery here involved will not be taxed in New York, constitutes no basis to confer upon New Jersey jurisdiction to tax. Either New Jersey has jurisdiction upon reasonable grounds, or it has not.

This principle is stated precisely in *Commonwealth* v. *West India Oil Refining Co.*, 138 Ky. 828 (1910), *supra*, p. 31, where the Court held (page 834):

> "The question in this case is not therefore whether the property in question has been taxed in Cuba or Porto Rico. The question is simply, Is it taxable here? If it has not been taxed there, it may

still be taxed there. *If not, that fact will not confer jurisdiction to tax it here.*"*

In *Miami Coal Co.* v. *Fox,* 203 Ind. 99 (1931), *supra,* p. 29, the Court, in concluding that the state of the domicile had no jurisdiction to tax intangibles which had acquired a situs outside of the state, held (page 115):

> "And it does not matter to reach such a conclusion whether such property was taxed in such foreign jurisdiction or not, or even whether it was subject to taxation."

Likewise in *Commonwealth* v. *Appalachian Electric Power Co.,* 159 Va. 462 (1932) *cert. denied* 288 U. S. 613 (1933), *supra,* p. 34, the Court held (page 471):

> "The fact that the State of New York imposes no such tax on this class of property is immaterial. The controlling question is, has that State the right to tax the property? We think it has. If so, Virginia under the decisions, has no such right."

The decisions of this Court likewise indicate that merely because property may escape from taxation elsewhere does not confer jurisdiction upon another state. *Buck* v. *Beach,* 206 U. S. 392 at 400 (1907); *Baldwin* v. *Missouri,* 281 U. S. 586 at 593 (1930):

The true issue here presented is whether there are reasonable grounds to support the jurisdiction of New Jersey to tax the intangible property of a domestic corporation, where such corporation has acquired a commercial domicile in New York where its intangible property has also acquired a business situs. Upon this issue it is submitted

* Italics ours.

that whether New York has exercised its admitted jurisdiction to tax or not is entirely immaterial.

It is respectfully submitted that for the reasons urged herein the judgment of the New Jersey Court of Errors and Appeals should be reversed.

Respectfully submitted,

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